

1 MARC J. FAGEL (Cal. Bar No. 154425)
2 MARK P. FICKES (Cal Bar No. 178570)
fickesm@sec.gov
3 SUSAN F. LA MARCA (Cal. Bar No. 215231)
lamarcas@sec.gov
4 ELENA RO (Cal. Bar No. 197308)
roe@sec.gov

5 Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
6 44 Montgomery Street, Suite 2600
San Francisco, California 94104
7 Telephone: (415) 705-2500
Facsimile: (415) 705-2501

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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN JOSE DIVISION

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14 SECURITIES AND EXCHANGE COMMISSION,

15 Plaintiff,

16 vs.

17 KENNETH L. SCHROEDER,

18 Defendant.

19 Case No. C-07-3798 JW (HRL)

20 DECLARATION OF SUSAN F. LaMARCA
(IN SUPPORT OF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS)

21 Date: March 24, 2008
Time: 9:00 a.m.
Location: Courtroom 8, 4th Floor
Honorable James Ware

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24 I, Susan F. LaMarca, declare that I have personal knowledge of the facts set forth below, and
25 if called as a witness could and would competently testify as follows:

26 1. I am an attorney licensed to practice law and admitted to practice before the United
27 States District Court for the Northern District of California. I am counsel of record for the Securities
28 and Exchange Commission ("Commission") in this case.

1 2. On October 3, 2007, the Commission served its Initial Disclosures on defendant in this
2 action, describing persons who may have discoverable information about the complaint, and
3 documents the Commission received. By October 3, however, the Commission had already
4 produced, mostly in electronic format, copies of the documents the Commission had received during
5 its investigation, including each of the documents referenced in the complaint as well as memoranda
6 prepared by KLA-Tencor's counsel (Skadden) of interviews of various persons. The Commission
7 provided these documents to defendant without requiring that he serve formal Rule 34 requests;
8 moreover, the electronic copies were provided to him without charge.

9 3. On November 1, 2007, the Commission served the first notice for a deposition in this
10 case, directed to Elizabeth Harlan, an attorney with Skadden Arps. As we explained to defense
11 counsel at the time, the Commission's counsel was aware that Ms. Harlan expected to be on extended
12 leave after December 2007, so we scheduled the deposition to occur during the first week of
13 December. Ms. Harlan and the parties agreed the deposition would occur on December 5, 2007.

14 4. In the days just before December 5, however, defense counsel suggested that privilege
15 assertions that Skadden had made to a document subpoena the defendant sent to Ms. Harlan might
16 present problems with her plans for questions at the deposition. Finally, on December 3, 2007, after
17 several communications between the parties in which counsel for the defendant, Shirli Weiss,
18 informed us that she was attempting to obtain a "clear statement" from Skadden about areas over
19 which they would assert privilege, Ms. Weiss asked the Commission's counsel to agree to put over
20 the deposition until April 2008. In her email message she stated: "the court might be annoyed if we
21 make the witness appear only to be instructed not to answer when we could state the positions at
22 issue on paper."

23 5. Although the Commission agreed to the several month delay in the first deposition we
24 noticed, we understood the purpose of the delay was to accommodate the defense's stated objective
25 of filing a motion to compel based on the clear statements about privilege the defense had received
26 from Skadden. Through February 2008, defendant filed no such motion to compel, but on February
27 10, and February 22, defense counsel again asked the Commission to put over Ms. Harlan's
28 deposition purportedly due to "privilege issues."

1 6. In mid-January 2008, Schroeder's counsel, Ms. Weiss, again indicated that she
 2 anticipated privilege issues would interfere with a deposition, this time of Stuart Nichols, whom the
 3 defendant had noticed for appearance on Sunday, January 27, 2008. (The Sunday schedule had been
 4 proposed by the deponent, and the parties agreed to accommodate him.) Ms. Weiss informed us that,
 5 although she was attempting to reach a stipulation with KLA to obviate the deposition, she
 6 anticipated that she would need to "make a deposition record," as she did not believe that the
 7 defendant and KLA would reach a stipulation. Also at this same time, on January 17 and 18, 2008,
 8 Ms. Weiss asked us about our availability for specific dates in February and March which she
 9 proposed for the hearing on her intended "motions to compel production of documents and testimony
 10 against both KLA and, separately, Skadden." Mr. Nichols' deposition went forward on January 27,
 11 2008, but the motions to compel were never filed.

12 7. On December 17, 2007, the parties attended the initial case management conference,
 13 during which the principal issues appeared to be our disagreement over the discovery cut-off date,
 14 and the number of depositions to be allowed. Defense counsel suggested that discovery was
 15 complicated in this case by privilege issues that could be resolved only through lengthy and hard
 16 fought litigation with KLA.

17 8. On January 29, 2008, the parties attended the discovery conference with Magistrate
 18 Judge Lloyd, for the purpose of preparing a Stipulated Discovery Plan. We asked Magistrate Judge
 19 Lloyd to set a deadline for the defendant to file a motion to compel, stating our belief that defendant's
 20 failure to do so up until that date, while going forward with depositions, was causing inefficiencies
 21 and would needlessly result in multiple depositions of certain deponents. Magistrate Judge Lloyd
 22 declined to impose any deadline. Counsel for defendant, Ms. Weiss, stated that the motion to compel
 23 had not yet been filed because KLA had been "equivocal" about its assertion of privilege. She
 24 assured Magistrate Judge Lloyd and the Commission that a motion would be filed very soon and
 25 sought, and was granted by the Court, permission to file a single, 40-page brief, rather than two 25-
 26 page briefs directed at KLA and Skadden.

27 9. On February 1, 2008, defendant filed the instant "motion to dismiss" without counsel
 28 for defendant first meeting and conferring with the Commission regarding the issues in his moving

1 papers. In a conversation days after the filing, I informed defense counsel (Jeff Coopersmith) that the
2 Commission regarded their unwillingness to meet and confer before filing defendant's motion to be a
3 violation of the Local Rules requiring parties to meet and confer before filing any discovery motions.
4 I further informed defense counsel that we considered the instant "motion to dismiss" to be a
5 mislabeled discovery motion.

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7 I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day
8 of March 2008 in San Francisco, California

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10 /s/ Susan F. LaMarca
Susan F. LaMarca

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